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No. 82-944

In the Supreme Court of the United States

OCTOBER TERM, 1982

WALTER "FRENCHY" BAGNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether charges of transporting obscene materials in interstate commerce, in violation of 18 U.S.C. 1462 and 1465, may properly be prosecuted in the district of receipt.

2. Whether the issue of obscenity may be judged according to the community standards of that portion of the federal judicial district from which jurors are customarily drawn in criminal trials in the city of receipt, rather than the community standards of the entire district.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-38) is reported at 679 F.2d 826. The opinion of the district court (App. A, *infra*, 1a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on June 28, 1982, and a petition for rehearing was denied on September 21, 1982 (Pet. App. B). The petition for a writ of certiorari was

filed on November 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of two counts of interstate transportation of obscene films by common carrier, in violation of 18 U.S.C. 1462 (counts 1 and 3), and two counts of interstate transportation of obscene films for the purpose of sale and distribution, in violation of 18 U.S.C. 1465 (counts 2 and 4). He was sentenced to 18 months' imprisonment and fined $5,000 on count one; he was sentenced to five years' probation on the remaining counts.

In early 1977, the FBI began a nationwide investigation of violations of the federal obscenity laws. FBI Agent Patrick Livingston formed a corporation in Miami, Florida, that purportedly engaged in the mail order pornography business. Livingston then ordered sexually explicit materials from dealers across the country.

Petitioner was a distributor and producer of pornographic films in Los Angeles, California. In September 1977 while in Los Angeles, Livingston was introduced to petitioner by Paul Howard, who owned adult book stores and massage parlors in Tampa, Florida. Petitioner had supplied Howard with pornographic merchandise in the past. Petitioner told Livingston that he was acquainted with the owner of a peep show in Dade County, Florida, and that he had customers in Tulsa, Baltimore, New York, and Chicago (Tr. 172-189).

On the following day, at petitioner's office, Livingston expressed an interest in purchasing porno-

graphic films that would be shipped to his company in Miami. With no reluctance, petitioner agreed to sell petitioner 50 films at $5.50 per film. Livingston received the shipment in Miami four days later. The package contained ten copies each of five pornographic films depicting heterosexual activity (Tr. 185-188).

Later in the month, petitioner travelled to Tampa to conduct business with Howard. Livingston met the two men and paid petitioner for the films with a $250 check. The check was returned by the bank, however, without payment. Livingston therefore met with petitioner again in October in Chicago and reimbursed petitioner in cash (Tr. 196-197). Livingston ordered more films from petitioner at this time. These films were from a series of films produced by petitioner and depicting homosexual activity. Petitioner charged Livingston five dollars per film. In December, while in Miami, Livingston received a shipment of four films sent by petitioner (Tr. 208-217).

Two films from the first shipment and two films from the second shipment were alleged in the indictment to be obscene. These films contained no plot, sound, or subtitles, and they explicitly depicted ultimate sexual acts photographed at close range.

2. a. Prior to trial, petitioner moved for a change of venue or, in the alternative, dismissal of the indictment. He claimed that he could not be prosecuted in the Southern District of Florida unless the government proved that he had shipped pornographic materials to that district prior to his dealings with Agent Livingston. He relied on *Blucher* v. *United States*, 439 U.S. 1061 (1979), in which this Court granted the government's request to vacate an obscenity conviction obtained in violation of an internal

Justice Department policy against arbitrary forum shopping in such cases. The district court held that the order in *Blucher* was not a binding precedent or a decision on the merits of the venue question (App. A, *infra*, 3a-7a). In addition, the court concluded that the internal policy had not been violated here. The court noted that the pornography investigation that led to petitioner's indictment was originally begun by a local Dade County police officer (App. A, *infra*, 2a). FBI agents aided the investigation by working undercover and by setting up a business in Miami from which they ordered pornographic materials. *Ibid.* The court further found that the government did not select Miami in bad faith (*id.* at 4a, 13a):

> [T]he record reveals no direct evidence that Miami was chosen as the forum because of its conservatism in matters of sexual expression, nor is there evidence of a punitive motivation by the government in trying these cases in Miami. * * *
>
> The government points to evidence that its * * * operation developed out of a budding successful undercover operation by local law enforcement officers and that the continuation of the operation in Miami over the two and one-half year period was a natural and inevitable way to maintain the apparent integrity of the undercover operation. Furthermore, the government opines that Miami is actually a rather liberal and tolerant community.
>
> * * * * *
>
> [T]he evidence adduced to this date in all the hearings concerning these cases does not indicate outrageous governmental misconduct. The government's choice of venue in Miami is logical and reasonable. The origin of the undercover op-

> eration in Miami can only be attributed to good faith motivations.

Based on these findings and its interpretation of *Blucher*, the district court denied petitioner's motion.

b. Petitioner also urged the court to make the entire Southern District of Florida the appropriate community for the purpose of evaluating the obscenity vel non of the films. However, in accordance with local practice, the jury venire was drawn entirely from Dade County, the site of the trial and the county into which petitioner had mailed the films. The district court instructed the jurors (Tr. 517) to evaluate the films by "the contemporary community standards in the Southern District of Florida, particularly Dade County * * *." Applying these standards, the jury found the films obscene.

3. The court of appeals affirmed (Pet. App. A-1 to A-38). It found that venue in the district of receipt was proper because offenses "involving the use of the mails, or transportation in interstate commerce" may generally be prosecuted "in any district from, through, or into which such commerce or mail matter moves" (18 U.S.C. 3237). The court of appeals also rejected petitioner's claim that *Blucher* v. *United States*, *supra*, called for a different result (Pet. App. A-13 to A-14):

> It is clear that the Supreme Court's disposition of *Blucher* was not a decision on the merits of the venue claim, but was merely a response to the Solicitor General's motion. See *Thompson* v. *United States*, 444 U.S. 248, 249-250 * * * (1980) (per curiam) (citing *Blucher* as an example where the Court had "responded to requests by the Government * * * by granting certiorari and vacating the judgments"). Conse-

> quently, the summary action of the Supreme Court in *Blucher* has no precedential value for the specific venue issue presented in this case. Indeed, [petitioner's] due process argument has been foreclosed by the decision in *Hamling* v. *United States*, 418 U.S. at 87 * * *. In *Hamling* the Supreme Court specifically held that it was constitutionally permissible to subject defendants in obscenity prosecutions to varying community standards of the various judicial districts into which they transmit obscene material. *Id. at* 106 * * *.

The court of appeals further held (Pet. App. A-15 to A-16) that the Department of Justice's policy against arbitrary forum shopping "create[s] no enforceable right on the part of a criminal defendant. * * *" The court stated (*ibid.*), "[i]t is thus solely within the province of the Justice Department to determine whether an internal policy against forum shopping in obscenity cases should bar prosecution in a given case."

The court also rejected petitioner's claim that the jury should have been drawn from the entire judicial district, and especially Broward County, rather than Dade County alone (Pet. App. A-31 to A-34). The court noted that the Southern District of Florida is required to hold court in five cities, including Miami, the county seat of Dade County. The jury selection plan for the Southern District provides for the selection of jurors from only those counties nearest the site of trial. Hence, the court concluded, petitioner had no right to a jury drawn from the entire district or from Broward County, which provides jurors for trials held in Ft. Lauderdale (Pet. App. A-33 n.10).

Similarly, the court held that it was proper for the jurors to judge the films by the standards of Dade County (Pet. App. A-33 to A-34).[1]

ARGUMENT

1. Both courts below correctly held that it was proper to try petitioner in the Southern District of Florida. Petitioner does not deny that the applicable venue statute, 18 U.S.C. 3237(a), permits prosecution in any district in which the offense was "begun, continued, or completed." Here, the offenses were "completed" in the district of receipt, the Southern District of Florida. Petitioner argues, however, that this Court held in *Blucher* v. *United States*, 439 U.S. 1061 (1979), that a person who ships obscene materials to a government agent at the agent's request may not be prosecuted in the district of receipt unless the shipper previously sent such materials to private parties in that district. Petitioner misconstrues both the government's policy against arbitrary forum shopping in obscenity cases and the effect of this Court's ruling in *Blucher*.

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[1] On December 20, 1982, the district court entered an order dismissing most of the indictments that stemmed from the 1977 Miami-based pornography investigation. The court found that Agent Livingston had testified falsely before the grand jury. The government has moved for reconsideration of this order in the district court.

Petitioner was not among the defendants who moved for dismissal. On December 23, 1982, however, the district court granted petitioner 30 days in which "to file the appropriate Motion requesting the judgment and conviction heretofore entered to be set aside" (App. B, *infra*, 15a). Thereafter, pursuant to petitioner's request, the district court agreed to take no action in petitioner's case until this Court disposes of his certiorari petition.

As previously noted, the venue statute authorizes prosecution of a shipper or mailer of obscene materials in the district from which the materials are sent, the district of receipt, and any other district through which they pass. 18 U.S.C. 3237(a).[2] And because obscenity vel non is determined by the standards of the community in which the trial is held, venue plays an important role in obscenity prosecutions. In enacting the federal obscenity statutes, Congress fully approved the bringing of obscenity prosecutions in the district of receipt (see H.R. Rep. No. 1614, 85th Cong., 2d Sess. 2 (1958); 104 Cong. Rec. 8991-8992 (1958) (remarks of Rep. Reuss)). However, Congress expressed concern about prosecuting such cases in districts through which the materials passed because prosecution in such districts would make a distributor's fate depend upon such fortuitous and uncontrollable circumstances as postal and shipping routes rather than upon a conscious decision to send materials into the district of prosecution. To allay these concerns, the Post Office Department represented that it would not press for prosecution in districts through which the materials merely passed. S. Rep. No. 1839, 85th Cong., 2d Sess. 2 (1958).

The *Blucher* policy was developed in accordance with this promise. Blucher operated a mail order pornography business in Oregon and was under investigation by the Oregon postmaster. At the request

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[2] Prosecution in the Southern District of Florida also comported with the constitutional requirement that the charges be brought in the state where the offenses occurred (Article III, Section 2), and with the Sixth Amendment and Fed. R. Crim. P. 18, which require that the indictment be returned in the district in which the offense is committed.

of the Oregon postmaster, the postmaster in Wyoming ordered materials from Blucher. *United States* v. *Blucher*, 581 F.2d 244, 245 (10th Cir. 1978). The government had no reason to believe that Blucher had previously conducted business in Wyoming. On the contrary, "[t]his communication between postmasters was made for no apparent reason other than a subjective judgment that a Wyoming venire would hold a more restrictive 'community standard' " (*ibid.*; footnote omitted). Blucher was indicted, tried, and convicted in the District of Wyoming, and his contention that venue in that district was improper was rejected at trial and on appeal (*ibid.*).

When Blucher petitioned for certiorari, the government re-examined its venue policy in obscenity prosecutions. While asserting its right to bring such prosecutions in the district of receipt and to use postal inspectors and other government agents to solicit obscene materials from pornography distributors, the government nevertheless decided that it would not bring prosecutions in the district of receipt if the defendant had no business contacts with non-governmental customers in the area and the district had been selected for no reason other than its strict community standards. See *Blucher* v. *United States*, No. 78-571 (1978 Term), Memorandum for the United States, 5-7.

The *Blucher* policy is a narrow one. Where the defendant has had prior contacts with both the district of mailing and the district of receipt, the policy is not violated if the government elects to prosecute in the more conservative district. And if the district of receipt is selected for a legitimate reason other than its conservative community standards, the *Blucher* policy permits prosecution in that district even if the defendant did not previously conduct business there.

The government has concluded that the *Blucher* policy was not violated in the present case. First, Miami was selected as the destination for the obscene films for entirely neutral reasons and not because it was believed to be a place where obscenity convictions are relatively easy to obtain. Miami was the headquarters of a nationwide investigation concerning a suspected conspiracy among traffickers in pornography. Moreover, unlike Wyoming, Miami is urban and densely populated, has an extremely heterogeneous population, and its sexual mores are not reputed to be particularly conservative.[3] If the government had been forum shopping, it certainly could have found many districts with less permissive community standards. Furthermore, the fact that petitioner had been sending his wares to Tampa and was an acquaintance of a Miami peep show owner weighs against applying the *Blucher* policy here. That policy is based on principles of fairness, not on the mechanical application of self-imposed venue rules. Had Agent Livingston requested that the films be sent to Tampa instead of Miami, it is doubtful that petitioner's chances of acquittal would have been enhanced.[4] It is therefore sufficient for the purpose of the *Blucher* policy that petitioner shipped his materials into a Florida city prior to the government's investigation.[5]

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[3] In the opinion of the district court, Dade County is the most liberal county in the Southern District (Tr. 442-443).

[4] For petitioner, a resident of California, prosecution in Tampa probably would not have been more convenient than prosecution in Miami.

[5] We note that petitioner regularly shipped his wares to any city with a willing customer; for instance, he shipped to Tulsa, Chicago, Baltimore, and Tampa. Moreover, he expressed no reluctance in selling to Agent Livingston in Miami.

In any event, the internal policy against arbitrary forum shopping in obscenity prosecutions "is intended to be no more than self-regulation on the part of the Department of Justice" (*United States* v. *Nelligan*, 573 F.2d 251, 255 (5th Cir. 1978)). It bestows no enforceable right upon the accused. *United States* v. *Caceres*, 440 U.S. 741 (1979); cf. *United States* v. *Thompson*, 579 F.2d 1184, 1189 (10th Cir.) (en banc), cert. denied, 439 U.S. 896 (1978). Therefore the accused should receive the benefit of that policy only when "its application is urged by the Government." *Rinaldi* v. *United States*, 434 U.S. 22, 31 (1977) (regarding the Department's policy against successive state and federal prosecutions for the same offense). Because prosecution in the district of receipt is clearly authorized by 18 U.S.C. 3237(a) and because the Department has concluded that internal policy does not preclude prosecution in Miami, petitioner's venue argument must fail.[6]

2. Assuming that trial in Florida was appropriate, petitioner alternatively contends (Pet. 23-33) that the obscenity vel non of the four films should have been judged by the standards of the entire Southern District, rather than Dade County alone. This claim is wholly without merit. There is no constitutional or statutory prohibition against limiting the relevant community to that part of a district in which the offense was committed and from which the jury

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[6] Even if venue was not proper in the Southern District of Florida, petitioner is not entitled to dismissal of the indictment. His only remedy would be a new trial in the district from which the materials were shipped, *i.e.*, the Central District of California. In *Blucher* we asked this Court to dismiss the indictment only because the government had already decided not to retry the defendant.

panel is customarily drawn. This Court has approved obscenity prosecutions based on a national standard (*Hamling* v. *United States*, 418 U.S. 87, 103-110 (1974)), a statewide standard (*id.* at 105; *Miller* v. *California*, 413 U.S. 15, 30-32 (1973)), and an undefined "contemporary community standard[]" (*Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974)). The federal obscenity statutes embody a "local standard." *Smith* v. *United States*, 431 U.S. 291, 304 (1977). But as the above case makes clear, the Constitution does not fix precise geographical limits for the relevant community.

Moreover, in many instances, practical considerations weigh against a community that is coextensive with the judicial district. For example, a requirement of district-wide venires would often be unduly burdensome on the prospective jurors, particularly in large districts like Montana or Alaska or even the Southern District of Florida. And in those districts consisting of both urban and suburban or rural areas, drawing jurors from the entire district would probably not work to the benefit of a defendant charged with shipping obscene materials to an urban location. Congress has subdivided many judicial districts, and jury pools are often restricted to residents of counties reasonably accessible to the site of the trial. The Southern District of Florida consists of twelve counties, and trials are held in five separate cities. 28 U.S.C. 89(c). If trial is scheduled in Miami, jurors are drawn from Dade and Collier counties (Pet. App. A-33 n.10).[7] If trial is sched-

[7] In this case, residents of the more rural Collier County were not included in the venire. Petitioner never specifically objected to their exclusion. The gravamen of his complaint has always been the exclusion of Broward County jurors.

uled in Fort Lauderdale, jurors are drawn principally from Broward County. Thus, Broward County residents do not sit on juries in Miami trials.[8] Petitioner has cited no authority requiring the suspension in obscenity cases of the Southern District's plan for the selection of juries.

Furthermore, the Dade County jurors were properly instructed to adjudge the films by "the contemporary standards of the Southern District of Florida, particularly Dade County" (Tr. 517). Because a juror draws on his knowledge of his own community (*Hamling* v. *United States*, *supra*, 418 U.S. at 104), the paramount concern in an obscenity prosecution is that the juror live in the community where the offense was committed. A juror who lives in one county may be unable to ascertain the standards of a different county. See *Miller* v. *California*, *supra*, 413 U.S. at 32-33; *United States* v. *Cohen*, 583 F.2d 1030, 1041 (8th Cir. 1978). Here, the films were shipped to Dade County. The jurors were selected from that county, and they properly applied the standards of their own community.[9]

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[8] Petitioner's claim that Broward County is more liberal and tolerant of pornography than is Dade County is sheer speculation. Broward and Dade Counties are contiguous and both contain large cities. We doubt that their community standards differ appreciably.

[9] Petitioner contends (Pet. 27) that "[a] person shipping sexually explicit materials to, for example, the Southern District of Florida relies on the fact that the liberal community of Fort Lauderdale, in Broward County, is a part of the relevant community." This point is not well taken. If such a person may be assumed to know the boundaries of the federal judicial district of receipt, he may also be assumed to know the portions of the district from which jurors are drawn for trials in the city of receipt. Furthermore, the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1983

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shipper would also be risking state prosecution, and as petitioner concedes (Pet. 29), Florida uses a county-wide standard. See *Johnson* v. *United States*, 351 So. 2d 10, 11 (Fla. (1977)).

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, PLAINTIFF

v.

DEFALCO, *et ano.* (S1)

v.

GUARINO, *et. al.* (S2)

v.

PERAINO, *et al.* (S3)

v.

BOUDREAULT, *et ano.* (S4)

v.

ARNO, *et al.* (S5)

v.

GASWIRTH, *et ano.* (S6)

v.

BELMONT, *et al.* (S7)

v.

WEINTRAUB (S8)

v.

BERNSTENE, *et ano.* (S9)

v.

STURMAN, *et al.* (S10)

v.

HIND, *et ano.* S(11)

v.

DI BERNARDO, *et al.* (S12)

v.

GUGLIELMI (S13)

v.

BAGNELL (S14)

v.

BLOOM, *et. al.* (S15)

v.

ARIENO, *et. al.* (S16)

DEFENDANTS

[Filed Apr. 20, 1981]

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS BASED ON THE GOVERNMENT'S BAD FAITH FORUM SHOPPING

ORDER

This cause is before the Court on the motions of the above defendants to dismiss the indictments in these cases because the government solicited each of the defendants to send allegedly obscene material to Miami and then selected Miami as the forum in which to seek the indictments and to go to trial. Since the defendants rely almost exclusively on the case of *Blucher* v. *United States*, 439 U.S. 1061 (1979), a careful analysis of the holding of this case is necessary to resolve these motions. First, however, a brief statement of the basically uncontested facts is in order.

In 1977, the Federal Bureau of Investigation took over an undercover investigation of major pornography distributors which was originally begun by Of-

ficer Vince Di Giacomo of the Dade County (Fla.) Public Safety Department. F.B.I. agents Patrick Livingston and Bruce Ellavsky were the central undercover figures in the two and one-half year investigation, which the F.B.I. labelled "Miporn" for Miami pornography. Livingston and Ellavsky set up a Florida corporation with offices in Miami and then set about the process of meeting and becoming accepted by national pornography distributors whom they met through introductions at conventions attended by the distributors.

Conventions at Miami, New Orleans, Las Vegas, Seattle, and other cities served as the primary way in which the F.B.I. agents broadened their connections in the pornography business. Each new distributor the agents met was requested by the agents to ship pornographic films and magazines across state lines to the office of the agents' corporation, Golde Coaste Specialties, Inc., in Miami, Florida.

The government contends that each of the defendants did ship such materials to Miami pursuant to the request of the undercover agents. While not disputing that claim, the defendants, or several of them, contend that they had no prior contacts with the Southern District of Florida other than those requested by the government and they were entrapped into sending the materials to Florida. However, the entrapment question, where properly raised, in one for the jury and will not be dealt with here.

The defendants have been charged with violations of 18 U.S.C. §§ 1462 and 1465 as well as with conspiring to violate those statutes. The two substantive statutes proscribe interstate shipment of obscene matter by common carrier or express company and interstate transportation of obscene matter of sale or distribution. 18 U.S.C. § 3237 is the venue statute ap-

plicable to the prosecutions. The defendants contend that the government has unfairly taken advantage of the venue statute by deliberately, for bad faith reasons, selected Miami as the forum in which to bring these prosecutions. Specifically, it is alleged that the government was attempting to find a conservative community in which to try obscenity cases, that obscenity cases had been successfully prosecuted previously in Miami, and that the expense of defending these cases in Miami would in itself punish the defendants for their actions.

However, the record reveals no direct evidence that Miami was chosen as the forum because of its conservatism in matters of sexual expression, nor is there evidence of a punitive motivation by the government in trying these cases in Miami. The Court takes judicial notice of the fact that many persons find it bearable or even pleasurable to spend a vacation in the Miami area.

The government points to evidence that its Miporn operation developed out of a budding successful undercover operation by local law enforcement officers and that the continuation of the operation in Miami over the two and one-half year period was a natural and inevitable way to maintain the apparent integrity of the undercover operation. Furthermore, the government opines that Miami is actually a rather liberal and tolerant community as well as a pleasant place to visit.

The law on this question is not extensive. In *Hamling* v. *United States*, 418 U.S. 87 (1974), the Supreme Court established that local community standards must be applied in federal obscenity cases. The Tenth Circuit, in *United States* v. *Blucher*, 581 F.2d 244 (1978), held that the opinion in *Hamling* coupled

with 18 U.S.C. § 3237, the venue statute which gives the government the choice of prosecuting obscenity cases where the allegedly obscene items were *sent*, where they were *received*, and in any district through which the material *travelled*, authorizes the government to induce the shipment of pornographic matter to such a highly conservative community as a small town in Wyoming. The Tenth Circuit quoted extensively from the *Hamling* opinion, especially language indicating that subjecting obscenity distributors to "the community standards of every hamlet into which their goods may wander" was a necessary result of the decision in *Hamling*, 418 U.S. at 144 (Brennan, J., Dissenting).

Until the appeal of the *Blucher* case to the Supreme Court, that Court had not had an opportunity to confront the issues raised by government-induced shipments of obscene material which lead to the government's choice of venue in a district which otherwise might have had no contact with the defendant.

The defendants contend that the Supreme Court's decision in *Blucher* v. *United States*, 439 U.S. 1061 (1979), is a decision on the merits and is binding as precedent. In *Blucher*, the petitioner was indicted for mailing obscene material from Oregon to a postal inspector, who, using a false name, posed as a civilian purchaser in Wyoming and requested Mr. Blucher to send him material that the government considered to be obscene. Prior to the trial, the petitioner moved to dismiss the indictment on the ground that he had never done business with anyone in Wyoming other than the postal inspector, and that the government had improperly forum-shopped for a more conservative community in which to try him. Upon denial of the motion, Blucher entered a plea of guilty to one

count of the indictment and the question of the legality of the proceeding was expressly reserved for appellate review. When the Tenth Circuit upheld the conviction, Blucher filed a petition for writ of certiorari which the Supreme Court granted. The Supreme Court, without writing an opinion, remanded the case to the United States District Court for the District of Wyoming with directions to vacate its judgment and to dismiss the indictment.

In *Blucher*, the government maintained in its memorandum to the Supreme Court on petition for certiorari that Blucher's arguments were legally unsound, but nevertheless concluded that,

> the petitioner's prosecution for mailing obscene materials to the Wyoming postal inspector violates policies that the Department of Justice is obligated to follow in the light of a commitment made by the Executive Branch to Congress with regard to choice of venue for prosecution of Section 1461 violations.

Because of these policies the government explained that the judgment of conviction should be vacated and the indictment dismissed.

The government's memorandum in *Blucher* elaborated on this executive policy, stating that,

> the Senate agreed to the language of the section under which petitioner was prosecuted only on an assurance that the Post Office would not press for prosecution of violations in districts through which the material alleged as obscene had passed, on its way from the district of deposit to the district of receipt. Although that assurance does not literally cover prosecutions in districts to which a pornography distributor sends material only in response to the request of government agent act-

> ing under a fictitious name, the Department of Justice is of the view that, in some circumstances, such prosecutions probably represent "unrestricted forum shopping" similar in character to the type about which the Senate expressed concern. Accordingly, it is the policy of the Department not to prosecute a pornography distributor under 18 U.S.C. 1461 in any district to which he has mailed material in response to a request from a government agent acting in an investigative capacity, so long as the Department had no information that the distributor has had any other contacts with the district relating to his pornography enterprise.

In *Blucher*, there was no indication that, before the mailings for which the defendant was indicted had occurred, he had ever mailed any porongraphic materials to a Wyoming resident or had solicited any business there. For this reason, the solicitor general stated that the defendant's prosecution violated the policy of the Department of Justice, and accordingly he requested that the Court vacate the judgment of the court of appeals and remand with directions to dismiss, which the Supreme Court did.

The defendants contend that where, as in *Blucher*, the government as respondent confesses error, the Supreme Court's acceptance of the confession of error constitutes a decision on the merits and has precedential weight. The defendants cite *Young* v. *United States*, 315 U.S. 257, 258-59 (1942), to support this contention.

Young involved the prosecution of a physician for administering Paregoric cough syrup and other preparations containing a limited amount of narcotics, without keeping records. The prosecution claimed that the physician was a "dispensing physician" and was,

under the Harrison Anti-Narcotics Act required to keep records. The court below took the position that it was an unconditional requirement that all vendors of exempt preparations keep records.

One of the errors confessed by the government in *Young* was that the penal provision did not apply to a physician who administers exempt preparations solely to patients whom he personally attends. The Supreme Court in considering the penal provision concluded that the government was correct in their confession of error, and that Congress meant to exclude physicians administering to patients they personally attend.

The defendants in the present cases rely upon the following statements by the Court in *Young*:

> The public trust reposed in the law enforcement officers of the government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors.

Id. at 258.

Despite the statement in *Young* regarding independent examination of the errors, the case is distinguishable from *Blucher*. Clearly, the government did not confess legal error in Blucher. It merely stated its own policy on a question of presumed agreement with the Congress, an issue which the Tenth Circuit had not directly treated.

Furthermore, in *Young*, the Court gave an opinion, allowing future litigants and courts to see their analysis of the errors claimed. In *Blucher*, by contrast, the Supreme Court gave no opinion at all. Admittedly, the fact that no opinion was given does not always deny all precedential value, though it might lessen it substantially. In *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974), Justice Rehnquist said of summary affirmances that while they "obviously are of precedential value" in support of the necessarily implicit holdings, "[e]qually obviously they are not of the same precedential value as would be an opinion of this court in treating the question on the merits." Also, in *Hicks* v. *Miranda*, 422 U.S. 332, 334 (1975), the Court quotes Justice Brennan, approvingly: "Votes to affirm summarily, and to dismiss for want of a substantial federal question . . . are votes on the merits."

Another distinction in *Blucher* which denies it precedential value is the fact that the judgment was vacated and the case remanded to the United States District Court for the state of Wyoming, with directions to vacate its judgment and dismiss the indictment. In contrast, *Young* was reversed and remanded. This is a very crucial distinction because in vacating the judgment there is no opinion at all to consider, unlike the situation resulting from a reversal or an affirmance, where the opinion affirmed or reversed can be referred to for guidance.

Moreover, if *Blucher* were precedent, the holding would leave so many unanswered questions as to be nearly meaningless. The decision, without opinion, offers no explanation of how to interpret previous contacts within the affected district by the defendant. Previous contacts could be confined only to contacts

with the state regarding materials upon which the indictment is based or could be any business done within the state. There is also no indication of which party would have the burden of establishing whether or not there were any previous contacts with the district.

For all the above reasons, the Court finds that *Blucher* is not a decision on the merits and is not binding as precedent. Thus, the Court is left with no clear precedent on the legal issue presented. The issue is one of due process of law, not entrapment, although the theory of the argument is found in an entrapment case, *Uniter States* v. *Russell*, 411 U.S. 423 (1973).

In *Russell*, an undercover agent supplied a quantity of a legal but difficult to obtain chemical to to members of a drug manufacturing ring he had infiltrated. In a five to four decision, the Court rejected Russell's contention that the government's involvement in the crime was so great that prosecution should have been barred as a matter of law. *Id.* at 430-31. The majority opinion left open the possibility that the Court might "someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32. The Court relied on its assessment that at least in drug related offenses, infiltration of drug rings and a limited participation in their illegal activities was permissible as the "only practicable means of detection." *Id.* at 432.

Hampton v. *United States*, 425 U.S. 484 (1976), presented the Court with the issue of improper law enforcement conduct, however the Court did not arrive at a majority opinion regarding the due process

applicable to such conduct. In *Hampton*, the petitioner was convicted of selling a drug to a government agent which had been supplied to him by another government agent. Hampton contended that although his admitted predisposition deprived him of the traditional entrapment defense, the government's outrageous conduct in supplying him with contraband for which he was convicted denied him due process of law. The plurality opinion rejected the petitioner's contentions. *Id.* at 488-490.

Justices Powell and Blackmun concurred in the result but disagreed with the plurality's view that due process could never bar conviction of a predisposed defendant regardless of the outrageousness of the government's behavior. Powell noted that the Court had not yet had the occasion *"to confront Government overinvolvement in areas outside the realm of contraband offenses," id.* at 493, thus implying that in such cases the Court might more readily find a sufficient level of outrageousness to bar prosecution.

Justice Powell's concurring opinion also noted as applicable to the due process issue the principles enunciated in Justice Frankfurter's concurring opinion in *Sherman* v. *United States*, 356 U.S. 369 (1958), an entrapment case:

> [W]e should not disregard lightly Mr. Justice Frankfurter's view that there is a responsibility "necessarily in [the Court's] keeping . . . to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals." *Sherman* v. *United States* . . . In another context Mr. Justice Frankfurter warned that exclusive focus on predisposition creates the risk that the Court will "shirk" the responsibility that he perceived. *Id.* 425 U.S. at 494, n. 5.

In addition, the concurring opinion in *Hampton* responds to the plurality's argument that without its absolute rule regarding predisposition, delineating limits on police involvement in crime will be difficult, however,

> these difficulties do not themselves justify the absolute rule. Due process in essence means fundamental fairness . . . . The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances. *Rochin* v. *California* [342 U.S. 165, 169-172 (1952)]. *Id.* at 494, n. 6.

The dissenting opinion by Justice Brennan expressed agreement with the concurring opinion that due process is a viable defense where government conduct has been egregious. *Id.* at 499. Thus, a majority of the Court, comprised of the concurring and dissenting Justices in *Hampton*, concluded that due process may be raised as a defense even by a predisposed defendant.

The Fifth Circuit addressed the due process theory after *Hampton in United States* v. *Graves*, 556 F.2d 1319 (1977). There, the Court held that the trial court did not err in entertaining a pre-trial motion to dismiss on the grounds of governmental misconduct. The indictment in issue in *Graves* charged the defendants with a conspiracy to submit false statements to the Federal Housing Administration. The defendants claimed that the indictment should be dismissed because government officials approved and encouraged submission of false statements. Although the Court held that dismissal of the indictment was not justified by the evidence in the case, the defense of due process

was stated to be a viable one in the Fifth Circuit. "We therefore conclude that it was proper for the district court to entertain the appellees' pretrial motion to dismiss on the ground of governmental misconduct." *Id.* at 1322-23. The Fifth Circuit has thus adopted the view of the concurring and dissenting justices in *Hampton*.

Returning to the facts of the present case, the evidence adduced to this date in all the hearings concerning these cases does not indicate outrageous governmental misconduct. The government's choice of venue in Miami is logical and reasonable. The origin of the undercover operation in Miami can only be attributed to good faith motivations.

Even if there had been bad faith, such that the government believed that Miami is very conservative and that defending a criminal trial is very expensive in Miami, such conduct, in and of itself, would not reach the level of "outrageous government misconduct." Thus, even though there may exist a valid entrapment defense applicable to one or more of the defendants in these cases, the government's choice of forum does not so violate due process of law as to require dismissal of the present indictments.

For all of the above reasons, the defendants' motions to dismiss the above indictments on the basis of bad faith forum shopping are hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 8 day of April, 1981.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

Copies to: all parties

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-56-Cr-EPS (S1-S-16)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT "DEBE" DIBERNARDO, ET AL., DEFENDANT

[Filed Dec. 23, 1982]

ORDER INSERTING OMITTED
FOOTNOTE TO OPINION

THIS COURT being aware of an omission to its Memorandum Opinion and Order Dismissing Indictments Without Prejudice, dated December 20, 1982 does hereby,

ORDER AND ADJUDGE that the following footnote be added to page 30:

[12] The Orders of dismissal contemplated in this opinion do not refer to cases: 80-56-Cr.-EPS (S3), (S12), (S14) and obviously (S9) (judgment of acquittal having heretofore been entered). As pertains to those cases the following action will hereinafter be taken by the Court: With regard to *United States* v. *Peraino, et al.*, 80-56-Cr-EPS (S3), the Court will issue a Rule to Show Cause why, even in light of the findings in this opinion, relief should be granted the defendants as Special Agent Livingston did not testify at that trial; as pertains to United States v. DiBernardo, *et al.*, 80-56-Cr-EPS (S12); the Court will issue a Rule to Show Cause why under the circumstances of

that case, Special Agent Livingston having testified, relief should not be granted; and finally with reference to *United States* v. *Bagnell*, 80-56-Cr-EPS (14), defendant is granted 30 days by Order of this Court within which to file the appropriate Motion requesting the judgment and conviction heretofore entered to be set aside.

Page 30 should read as follows:

ORDER AND ADJUDGE that an order shall hereinafter be entered dismissing without prejudice each of the superseding indictments in *United States* v. *DiBernardo, et al.*, Case No. 80-56-Cr.-EPS (S1-S16) and entering such other Orders as are appropriate in each case to dispose of all pending matters.[12]

DONE AND ORDERED in Chambers, at Miami, Florida this 23 day of December, 1982.
ect.

/s/ Eugene P. Spellman
United States District Judge

Copies furnished:

All attorneys of record.

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